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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 409

WILLIAM W. TURNER, *Petitioner*,

v.

ROBERT F. KENNEDY, et al., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

WILLIAM W. TURNER, *Petitioner,*

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ROBERT F. KENNEDY, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed an order of the United States District Court for the District of Columbia granting respondents' motion for summary judgment and denying petitioner's cross-motion for summary judgment.

OPINIONS BELOW

Neither the United States District Court nor the Court of Appeals delivered an opinion. The dissenting opinion of Judge Fahy of the Court of Appeals is reported at 332 F. 2d 304, a copy of which is appended to this petition (App. 2a).

JURISDICTION

The judgment of the Court of Appeals was entered on April 2, 1964 (App. 1a). Petitioner's application to that Court for rehearing *en banc* was denied on May 20, 1964, two members of that Court indicating they would grant petitioner's petition (App. 9a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1. Whether petitioner, an FBI agent for ten years, with rights under the Veterans Preference Act, may be arbitrarily discharged for having exercised his rights to petition the Congress, because the employing agency upon subsequent examination of his petition concludes it contained untrue statements.

STATUTES INVOLVED

Title 5, U.S.C., § 652(d):

> "The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with."

First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

Petitioner, a veterans' preference eligible under § 14 of the Veterans Preference Act, 5 U.S.C. § 863, challenges his dismissal from employment as a Special Agent of the Federal Bureau of Investigation.

By letter dated June 15, 1961, petitioner was notified by respondent John Edgar Hoover that his employment with the Federal Bureau of Investigation was to be terminated in thirty days. (R. 10). Petitioner replied to the charges; however, by letter dated July 3, 1961, he was advised that all charges were sustained and that his dismissal was to be effective as of July 19, 1961. (R. 52). Petitioner appealed to the Civil Service Commission pursuant to Section 14 of the Veterans Preference Act, 5 U.S.C. § 863. On oral hearing, the Appeals Examiner Office of the Civil Service Commission held there was sufficient evidence to sustain two of the four charges made, and affirmed the dismissal. (R. 54). On August 17, 1962, the Civil Service Commission's Board of Appeals and Review affirmed. (R. 71).

On October 5, 1962, petitioner instituted proceedings in the United States District Court for the District of Columbia for a declaratory judgment and a mandatory injunction. On May 20, 1963, the United States District Court for the District of Columbia entered an Order, without opinion, granting respondents' motion for summary judgment and denying petitioner's cross-motion for similar relief.[1] On appeal, the Court of

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[1] Petitioner has not and does not, however, admit that any of the statements by him, and relied upon by the Agency and Civil Service Commission to support his removal, were or are false, inaccurate, irresponsible or demonstrative of an attitude justifying his removal from employment. Petitioner argues only that true or false, there has been no finding that the statements were motivated by malice, violative of a qualified privilege, and, alternatively, that an absolute privilege attaches to petitions to Congress.

Appeals for the District of Columbia Circuit affirmed without opinion, Judge Fahy dissenting. (App. 2a) 332 F. 2d 304 (1964). A further petition to the Court of Appeals for a rehearing *en banc* was denied on May 20, 1964, two members of the Court expressing the view that a rehearing should be granted. Petitioner now seeks certiorari.

The record shows that in 1960, petitioner was a Special Agent of the Federal Bureau of Investigation with approximately ten years of service. During that year he was assigned to duty at Oklahoma City, Oklahoma, an assignment petitioner questioned as having perhaps been made in error. (R. 61) Because he questioned the advisability of his assignment, his superiors ordered that an investigation be made of him. This investigation resulted in a thirty-day suspension. (R. 33). Petitioner pursued the matter further, eventually petitioning two members of the Congress. This petitioning, detailed below, led to the dismissal in question.

In pursuing redress of his grievances, petitioner, on April 30, 1961, wrote to the late Senator Estes Kefauver complaining of the treatment he had received for questioning his assignment to Oklahoma City. In this letter petitioner said, among other things, "I was not prepared for the retaliation taken against me." (R. 37); "Although his [Chief Inspector Roy K. Moore] mission was obviously to discredit me, rather than conduct an impartial investigation, he was unsuccessful from any reasonable standard" (R. 38); "The interesting part of the whole thing is that Mr. Grapp's memorandum is now missing from file. Fortunately, I had prepared a copy for myself, which I now have" (R. 39); and "Mr. Hoover's comment, in a communication to all agents, is that Mr. Ogilvie made 'un-

founded allegations.' It would appear that any statement not serving to perpetuate the Hoover myth is therefore an 'unfounded allegation.'" (R. 39). In a subsequent letter, dated May 21, 1961, to Congressman Emanuel Celler, petitioner stated "As for his [petitioner's superior at Oklahoma City] own enthusiasm, he was not in the office on time once during the month of December, 1960, which speaks for itself. By the Bureau's own standards, my performance was considerably more than satisfactory." (R. 44).

On the basis of these letters and petitioner's previous activities, respondent Hoover's letter advising petitioner of his pending dismissal in thirty days preferred four charges against petitioner:

1. Petitioner demonstrated by untrue and unjustified statements that he did not possess the truthfulness, accuracy and responsibility required of a Special Agent (R. 10);
2. Petitioner was not amenable to discipline (R. 14);
3. Petitioner had shown a poor attitude toward the Federal Bureau of Investigation and its Director (R. 15);
4. Petitioner made unauthorized disclosures of information to members of Congress, indicating petitioner to be a security risk (R. 18).

The Appeals Examining Office concluded that there existed sufficient evidence to sustain charges one and three, but dismissed charges two (alleging that petitioner was not amenable to discipline) and four (alleging that petitioner was a security risk).

In concluding that there was sufficient evidence to sustain the charge that petitioner did not possess the

truthfulness, accuracy and responsibility required of a Special Agent (charge one), the Appeals Examining Office relied upon the statements made by petitioner in his letters to Senator Kefauver and Congressman Celler, and evidence offered by the Federal Bureau of Investigation tending to disprove those statements.

Regarding the Appeals Examining Office's finding that petitioner demonstrated a poor attitude toward the Federal Bureau of Investigation and its Director (charge three, specification c) reliance was had upon petitioner's statements to Senator Kefauver relating to the "Hoover myth."

The above quoted statements served as the sole basis for petitioner's discharge.

There was no finding or conclusion by the Appeals Examing Office that any of the statements to the named members of Congress were motivated by malice, actual or implied.

REASONS FOR GRANTING THE WRIT

A substantial question of constitutional and federal statutory law is presented by this petition for a writ of certiorari. Specifically, may an agency of the executive department discharge an employee, where such discharge is predicated upon statements of the employee to members of Congress in petitions for redress of grievances. Are such petitions entitled to an absolute privilege, or are they afforded a qualified privilege, whereby the privilege exists absent a showing of actual malice. It is the law of this case, as it presently stands, that the making of statements, which an employing agency later concludes to be untrue, inaccurate or irresponsible, serves to justify the removal of the employee making the statements. That is to say, there

is no privilege whatever to statements contained in a petition for redress of grievances. Respondents assert, and have been upheld in so asserting, that neither the First Amendment to the Constitution, nor 5 U.S.C. § 652(d) can interfere with the right of an employing agency to discharge the employee who has made statements, which the agency, upon reflection concludes are untrue.

The results flowing from this construction are contrary to the historical meaning of the First Amendment. This construction is also violative of the more specific expression of the Congress in 5 U.S.C. § 652 (d). Section 652(d) provides that the right of a government employee to petition shall not be denied or interferred with. That this section was designed to protect federal employees from the kind of reprisal received by petitioner in this case is apparent from the legislative history of the statute.

Section 652(d) as it now appears did not appear in the original Bill passed by the House and forwarded to the Senate. Section 652(c) relating to the right of persons in the postal service to present grievances was included, however, and an effort by the Senate committee considering the Bill to strike § 652(c) from the House Bill altogether was rejected by the Senate. Senator Williams observed:

> "It seems to me the freer we leave these people, the better. In fact, it is my idea that the freer we leave everybody, the better. These men have the right * * * if they wish to do so, to petition me for redress of grievances, or to petition you or anybody else, or any part of the Government, and I do not see why Congress should be 'putting its finger in the pie.' " 48 Cong. Rec. 10803.

Senator Reed in approving the committee's recommendation stated:

> "The effect of these rules, all taken together, has been that the employees of the Post Office Department have been fearful of their right to speak, even to the Congressman from their district, and to suggest to him needed changes. Mr. President, it will not do for Congress to permit the executive branch of this Government to deny it the sources of information which ought to be free and open to it, * * *" 48 Cong. Rec. 10674.

Not only was the effort to delete § 652(c) rejected by the Senate, but § 652(d) was added. The latter section must be construed in light of the comments relating to § 652(c), bearing in mind that it is even broader in terms than § 652(c).

The right of a citizen to petition for a redress of grievances without fear of reprisal carries with it a correlative right of the Congress of the United States to be informed. Noteworthy is the statement of Senator Reed, *supra,* expressing concern about the right of Congress to information without interference from the executive branch. That right of the Congress to be informed has been infringed upon by the decision of the courts below and the Civil Service Commission.

Statements made in petitions to members of Congress for redress of grievances must be privileged if the right is to survive. If they not be afforded an absolute privilege, they must be privileged in the absence of a showing of "actual malice"—that is, with knowledge that they were false, or with wreckless disregard of whether false or not.

Precisely this standard was adopted by this Court in the recent case *New York Times Co.* v. *Sullivan,*

376 U.S. 254 (1964), which involved the rights of free speech and free press guaranteed by the First Amendment.

In *Steck* v. *Connally*, 199 F. Supp. 104 (D.D.C. 1961) the District Court below considered a situation similar to that presented here. In *Steck* the plaintiff-government employee circulated a petition to Congress among his fellow employees. The employing agency in examining the contents of the petition concluded that the petition contained untrue statements, and discharged the plaintiff. The District Court, in granting the plaintiff-employee's motion for summary judgment, stated:

> "The Civil Service Act, 5 U.S.C.A. § 652, subsection (d), guarantees to all civil service employees individually and collectively, the right to petition Congress, or any member of Congress, or to furnish information to either House of Congress, or to any Committee or member thereof, free from any restriction or interference on the part of their superior officers.
>
> "Subsection (c) of the same Section, explicitly provides that the presentation of any grievance or grievances to Congress or any member thereof, shall not constitute or be a cause for reduction in rank or compensation or removal of such person or group of persons from the service. This statute does not contemplate that the head of a Department may censor the contents of the petition or that he may dismiss the employee concerned therein, if he can prove that the statements contained in the petition are untrue." 199 F. Supp. at 105.

In *Steck*, the court appropriately recognized an absolute protection to the contents of a petition to members of Congress. To suggest that the act of petitioning

Congress falls within the scope of protection afforded by § 652(d), but that the contents of the petition do not, is to frustrate entirely the clear statutory language. By using statements made by appellant in correspondence with congressmen against him in disciplinary proceedings, appellees have not only interferred with his right to petition Congress, but they have effectively denied that right altogether.

In the instant case petitioner's statements have been examined by the Federal Bureau of Investigation to determine if they were true true, responsible and justified. In this examination the Agency concluded they were not, and discharged petitioner. To adopt a rule conditioning the right to petition on the ability of the petitioner to demonstrate the truthfulness, accuracy and responsibility of the statements contained in the petition, would substantially inhibit the exercise of the right. More likely than not government employees would decline under any circumstances to either petition for redress of grievances or to make disclosures to Congress, for fear of reprisals from their superiors such as resulted to petitioner herein.

Of concern, too, is the fact that neither the District Court nor the Court of Appeals expressed by written or oral opinion their reasons for the denial of relief to petitioner. Such serious inroads upon the rights of the people as well as the Congress cannot justifiably be effected without expression of cogent, logical and deliberate thought.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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August, 1964

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963.

Civil 3160-62

No. 18,012

Filed Apr 2, 1964

WILLIAM W. TURNER, *Appellant*,

v.

ROBERT F. KENNEDY, Attorney General of the United States, et al., *Appellees*.

Appeal from the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Fahy and Bastian, Circuit Judges.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Dated: Apr 2, 1964

Circuit Judge Fahy files a dissenting opinion.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,012

WILLIAM W. TURNER, APPELLANT

v.

ROBERT F. KENNEDY, Attorney General of the United States, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

Mr. Vincent J. Fuller, with whom *Mr. Edward Bennett Williams* was on the brief, for appellant.

Mr. Stephen B. Swartz, of the bar of the Supreme Court of Minnesota, *pro hac vice,* by special leave of court, with whom *Assistant Attorney General Douglas, Mr. David C. Acheson,* United States Attorney, and *Mr. Alan S. Rosenthal,* Attorney, Department of Justice, were on the brief, for appellees.

Before: WILBUR K. MILLER, FAHY and BASTIAN, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam.

Dated: April 2, 1964

FAHY, *Circuit Judge, dissenting*: 5 U.S.C. § 652(d) provides:

> The right of persons employed in the civil service of the United States, either individually or collectively,

> to petition Congress, or any Member thereof, . . . shall not be denied or interfered with.[1]

Appellant was separated from his position in the classified Civil Service following proceedings in the agency[2] and in the Civil Service Commission. These included appropriate hearings which eventuated in findings and conclusions of the Commission that statements made by appellant in letters to a Senator and a Member of the House of Representatives regarding his treatment in his position, and other personnel conditions in the agency, were false, irresponsible and unjustified, demonstrating his unsuitability for continued employment in and impairing the efficiency of the agency.

The case comes to us on appeal from the grant by the District Court of summary judgment for appellees, with denial of appellant's cross-motion for summary judgment. It must be considered that appellant, in moving for summary judgment, conceded arguendo that the letters referred to contained false and irresponsible statements which were not justified, and that they demonstrated his unsuitability for the position he held; for the decision by the trial court was made on the administrative record which included such findings by the Commission and this record was not challenged by petitioner.

It is appellant's position that by reason of Section 652 (d) his separation from his position cannot rest upon proof of the falsity, irresponsibility and unjustifiability of his statements in petitions to Congress or a Member thereof. I appraise this position in light of the right to petition "for redress of grievances" guaranteed by the First Amendment.

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[1] 62 Stat. 356 (1948).

[2] Federal Bureau of Investigation.

I agree with the Commission that this right may be abused and is not absolute. It has been held that one who accepts employment in the Government also accepts curtailment of certain activities which he would be free to engage in were he to remain in private life, as illustrated by the Hatch Act. See *United Public Workers* v. *Mitchell*, 330 U.S. 75, 95-104 (1947). But the Hatch Act is a limitation placed by Congress upon the activities of the employees covered by it, whereas Section 652(d), to the contrary, is a guaranty by Congress to Civil Service employees of a right, the exercise of which "shall not be denied or interfered with." It would deny or interfere with the right if a consequence of its exercise were deprivation of employment. Equally clear would the right be denied or interfered with if the petition must be limited to statements which subsequent hearings and proceedings may show to have been true, responsible and justified. I recognize that in many situations the question whether particular conduct falls within the protection of a legal right depends upon findings made in hearings and proceedings subsequent to the conduct; but where the right claimed is the right to petition for redress of grievances the validity of its exercise cannot be made to depend upon a subsequent conclusion that the petition contained statements which were true, responsible and justified. Our District Court, speaking through Judge Holtzoff, stated in *Steck* v. *Connally*, 199 F. Supp. 104 (D.D.C. 1961),

> The Civil Service Act, 5 U.S.C.A. § 652, subsection (d), guarantees to all civil service employees individually and collectively, the right to petition Congress, or any member of Congress, or to furnish information to either House of Congress, or to any Committee or member thereof, free from any restriction or interference on the part of their superior officers.
>
> Subsection (c) of the same Section, explicitly provides that the presentation of any grievance or grievances to Congress or any member thereof, shall not constitute or be a cause for reduction in rank or com-

> pensation or removal of such person or group of persons from the service. This statute does not contemplate that the head of a Department may censor the contents of the petition or that he may dismiss the employee concerned therein, if he can prove that the statements contained in the petition are untrue.

The same reasoning applies to statements subsequently shown to have been irresponsible and unjustified.[3]

In urging otherwise appellees refer to remarks of Congressman Reilly during consideration by the House of the Bill which became the Act. In its then form it did not contain Section 652(d), but there was a provision which became Section 652(c), reading:

> [T]he presenting by any person or groups of persons [in the postal service of the United States] of any grievance or grievances to the Congress or any Member thereof shall not constitute or be cause for reduction in rank or compensation or removal of such person or groups of persons from said service.

Congressman Reilly said that employees "would have to assume the responsibility for their acts in the event of making false or misleading charges that could not be borne out by evidence on investigation." 48 Cong. Rec. 4656.

The Bill was passed by the House and went to the Senate. In reporting the Bill the Senate Committee recommended deletion of what is now Section 652(c):

> [I]t is the view of the committee that all citizens have a constitutional right as such to present their grievances to Congress or Members thereof. But governmental employees occupy a position relative to the Government different from that of ordinary citizens. Upon questions of interest to them as citizens, govern-

[3] I do not decide, however, that the contents of a petition furnishing classified information or confidential information of a nature that is in the public interest not to disclose is privileged.

> mental employees have a right to petition Congress direct. A different rule should prevail with regard to their presentation of grievances connected with their relation to the Government as employees. In that respect good discipline and the efficiency of service requires that they present their grievances through the proper administrative channels.

S. Rep. 955, 62nd Cong., 2d Sess. 21 (1912).

This recommendation encountered strong opposition in the Senate. The tenor of the debate was that Government employees should have just as broad a right to petition as that possessed by ordinary citizens. Senator Ashurst stated: "I am opposed to the striking out of this provision from the House bill. Under the Constitution all men have the right freely to speak, peaceably to assemble, and petition the Government for a redress of grievances." He read into the record an article which in part stated: "This provision of the Constitution [the right of petition] does not make exception of citizens who happen to be in the service of the Government. It does not say that all people may petition the Government, except, for instance, railway mail clerks." 48 Cong. Rec. 10671. Senator Reed also strongly opposed the Committee recommendation. He spoke of existing limitations on a government employee's right of petition, saying, "The effect of these rules, all taken together, has been that the employees of the Post Office Department have been fearful of their right to speak, even to the Congressman from their district, and to suggest to him needed changes. Mr. President, it will not do for Congress to permit the executive branch of this Government to deny it the sources of information which ought to be free and open to it, . . ." 48 Cong. Rec. 10674. Senator Williams stated: "It seems to me the freer we leave these people, the better. In fact, it is my idea that the freer we leave everybody, the better. These men have the right . . . if they wish to do so, to petition me for redress of grievances, or to petition you or anybody else, or any part of the

Government, and I do not see why Congress should be 'putting its finger in the pie'." 48 Cong. Rec. 10803.

The Senate not only rejected its Committee's recommendation to strike the House language but added a new and broader section. See 48 Cong. Rec. 10804. This is now subsection (d). It applies to all Civil Service employees, not only to postal employees, and its language is more general than that used in the House Bill. This language was accepted by the House and the Bill became law. Clearly, Section 652(d) encompasses petitions with respect to personnel grievances.

When we turn to the light cast by the First Amendment the scope of the protection of Section 652(d) is also seen to be broad. See *United States* v. *Cruikshank*, 92 U.S. 542, 552 (1875); *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945); *White* v. *Nicholls*, 44 U.S. 266 (1845); *Bridges* v. *California*, 314 U.S. 252 (1941). Mr. Justice Story, in his Commentaries on the Constitution, Vol. II, § 1895, at 645, note b (5th ed. 1891), wrote of the right of petition:

> The statements made in petitions addressed to the proper authority, in a matter within its jurisdiction, are so far privileged that the petitioner is not liable, either civilly or criminally, for making them, though they prove to be untrue and injurious, unless he has made them maliciously.

Notwithstanding the fact that the Senate debate indicates that full First Amendment rights were to be extended to a Civil Service employee by Section 652(d), perhaps his right is conditioned to a degree by the circumstance that he is in government service. Even so, we repeat, this can hardly require the content of his petition to be limited to statements which after investigation and hearing are found by the Commission to be true, responsible and justified. To require the valid exercise of the right to depend upon such a subsequent "audit," as it were, would inhibit its exercise so substantially as to take away

its scope as gathered from the language of the section, its history, and its relationship to the First Amendment.

The recent decision of the Supreme Court in *New York Times Co.* v. *Sullivan*, —— U.S. —— (1964) fortifies the view I take. The *Times* case is concerned with the protection accorded by the First and Fourteenth Amendments to freedom of speech and of the press. The reasoning of the court, however, seems to me to be in good part applicable to our case. There, responsibility in a libel action for criticism of the conduct of public officials with respect to matters of public interest was involved. The present case may be said to involve criticism of more limited concern, contained in a petition and not in the press. But the right of petition as well as freedom of the press is protected by the First Amendment. And not only is Section 652(d) explicit as to the right of petition but it is intended to have as broad a coverage as the similar right guaranteed by the First Amendment. Moreover, the grievances which may be the subject of a petition under the section clearly include personnel grievances of the employee. Not only so, but the letters of appellant were petitions to the very officials specified in the statute as the intended recipients of such petitions—the "proper authority" of Mr. Justice Story's language above quoted.

I think the privilege, though not absolute, should be governed by the same standard as has been adopted by the Court in the *Times* case, namely, whether the statements were made with actual malice, that is, with knowledge that they were false or with reckless disregard of whether false or not.[4]

I realize this view gives rise to something of a paradox. Appellant has been found unsuitable for the position from

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[4] The Examining Office found that some of the statements were made without appellant having a reasonable basis therefor. Aside from the absence of such a Commission finding, it is not clear the Examining Office found that appellant himself knew he had no reasonable basis.

which removed, yet I do not approve the removal in the proceedings before us. The explanation—indeed the justification—is that I think the means by which the removal was accomplished were not permissible under Section 652(d), read with the First Amendment. Even desirable ends are required to be achieved by lawful means. This is the sacrifice, if it may be so termed, required to maintain a rule of law, to which we are bound as the greater good. There may be instances where the error in means is insignificant in the full contex of the matter and so may be overlooked; but if, as I think, appellant's removal was inconsistent with the protection accorded by Congress in Section 652(d), and by the First Amendment, the error of course cannot be said to be insignificant.

I would have the case remanded to the Commission for reconsideration under the standards I have indicated.

(Filed May 20, 1964)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1963

No. 18,012

Civil 3160-62

WILLIAM W. TURNER, *Appellant*,

v.

ROBERT F. KENNEDY, Attorney General of the United States, et al., *Appellee*.

Before: Bazelon, Chief Judge, Wilbur K. Miller, Fahy, Washington, Danaher, Bastian, Burger, Wright, and McGowan Circuit Judges, in Chambers.

Order

On consideration of appellant's petition for rehearing *en banc*, it is

ORDERED by the court *en banc* that appellant's aforesaid petition is hereby denied.

Per Curiam

Circuit Judges Fahy and Wright would grant appellant's petition.

Dated: May 20, 1964